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No. 99-543

In the Supreme Court of the United States

JOHN R. LOUIS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause or the Excessive Fines Clause of the Constitution precludes the assessment of an addition to tax for civil fraud on an individual who previously has been convicted and sentenced for criminal tax offenses with respect to the same tax years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 170 F.3d 1232. The memorandum opinion of the Tax Court (Pet. App. B1-B9) is unofficially reported at 71 T.C.M. (CCH) 3143.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1999. A petition for rehearing was denied on June 25, 1999 (Pet. App. C1). The petition for a writ of certiorari was filed on August 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner John R. Louis was the subject of a grand jury investigation based on information developed by the Criminal Investigation Division of the Internal Revenue Service (Pet. App. B2). In 1984, petitioner was indicted on two counts of criminal tax offenses with respect to his returns for 1977 and 1978 (*id.* at B3).[1] After a jury trial, petitioner was found guilty on both counts. He was sentenced to imprisonment for one year on the first count and three years on the second count, with the three-year sentence suspended contingent upon completion of a five-year probationary period. He was also fined $5000 on each count (*ibid.*). He served his prison term, completed his probationary period, and paid the criminal fines (*ibid.*).

2. On December 23, 1991, the Commissioner issued statutory notices of deficiency to petitioner for 1976, 1977 and 1978 (Pet. App. B2).[2] Based upon the items of omitted gross income that were also involved in the criminal prosecution, the Commissioner determined (i) that petitioner had underpaid his taxes by $1,448 for 1976, $14,340 for 1977, and $74,609 for 1978 and (ii) that

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[1] The documents attached to the Commissioner's Answer in the Tax Court show that petitioner was indicted and convicted of filing false returns, a violation of 26 U.S.C. 7206(1). See Tax Ct. No. 5942-92: CR 3: Answer (Exh. A: Indictment; Exh. B: Criminal Judgment); Tax Ct. No. 5943-92: CR 3: Answer (Exh. A: Indictment; Exh. B: Criminal Judgment). The parties nonetheless incorrectly stipulated that he was convicted under 26 U.S.C. 7201 (tax evasion). See C.A. E.R. 64-65. This error in the stipulation was pointed out in the government's brief in the court below. See C.A. Gov't Br. 3 n.2, 24-26.

[2] There is no statute of limitations on the assessment or collection of taxes with respect to a year for which the taxpayer has filed a fraudulent return. 26 U.S.C. 6501(c).

such underpayments were due to fraud (*id.* at B2-B3). Under the provisions of Section 6653(b) of the Internal Revenue Code then in effect, the Commissioner further determined that an addition to tax equal to fifty percent of the deficiency for each of these years was required. See 26 U.S.C. 6653(b) (1976). The resulting additions to tax were $724 for 1976, $7,170 for 1977, and $37,305 for 1978 (Pet. App. B2-B3).[3]

3. Petitioner filed petitions in Tax Court to contest the asserted deficiencies and additions to tax. He thereafter entered into a stipulation, however, in which he agreed that he would not contest his liability for the tax deficiencies and would contest his liability for the Section 6653(b) additions to tax only on constitutional grounds. Tax Ct. No. 5942-92: CR 24 (Stipulation of Settled Issues); Tax Ct. No. 5943-92: CR 27 (Stipulation of Settled Issues).

The Tax Court rejected the contention that the additions to tax were barred by either the Double Jeopardy Clause or the Excessive Fines Clause of the Constitution. The court concluded (Pet. App. B8) that the Double Jeopardy issue is controlled by *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), which held that additions to tax for fraud under the Internal Revenue Code are remedial, rather than punitive, and may therefore be imposed following a criminal prosecution without implicating the Double Jeopardy Clause. Because additions

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[3] The current counterpart to former Section 6653(b) is in Section 6663(a), which provides that, "[i]f any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud." 26 U.S.C. 6663(a). That Section is effective for all returns due after December 31, 1989. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7721(a), 103 Stat. 2395.

to tax are remedial rather than punitive, the Tax Court concluded that neither the Double Jeopardy Clause nor the Excessive Fines Clause is implicated in this case (Pet. App. B9).

4. The court of appeals affirmed (Pet. App. A1-A9). The court applied the two-step process described in *Hudson* v. *United States*, 522 U.S. 93 (1997), for determining whether a sanction is civil or criminal for Double Jeopardy Clause purposes: (i) looking first to whether Congress manifested a preference for one label or the other and (ii) then, if Congress intended to establish a civil penalty, evaluating whether the statutory scheme is nevertheless so punitive in purpose or effect as to transform the intended civil sanction into a criminal penalty (Pet. App. A3, citing *Hudson* v. *United States*, 522 U.S. at 99, and *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)). With respect to the first step of this analysis, the court of appeals held that Congress plainly intended the addition to tax for fraud to be "a civil, not a criminal sanction" (Pet App. A4). Then, applying the "guideposts" set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), the court determined that the additions to tax imposed on petitioner were not so punitive as to transform what Congress intended to be a civil sanction into a criminal penalty.[4]

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[4] The "guideposts" described by the court of appeals were (Pet. App. A3-A4):

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7)

The court found it particularly significant that the addition to tax for fraud has not historically been regarded as punishment and that its purpose is remedial, for it serves "as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud" (Pet. App. A5, quoting *Helvering* v. *Mitchell*, 303 U.S. at 401). Although the court acknowledged that several of the "guidepost" factors were present to some degree, it found them insufficient to render the addition to tax criminal or punitive in nature. For example, the court stated that the third guidepost factor ("scienter") is present in that fraudulent intent is a prerequisite to imposition of the addition to tax. The court concluded, however, that the existence of that factor is of little significance because "punishing fraudulent intent is not the central focus of [the addition to tax]"; instead, "[t]he fraud requirement is designed to ensure that the additions are imposed only on taxpayers who engage in the type of deceptive behavior that is difficult and costly for the IRS to detect" (*ibid.*).

The court of appeals also determined that the imposition of the addition to tax for fraud following petitioner's sentencing for criminal tax evasion did not implicate the Excessive Fines Clause. The court noted that the purposes of the addition to tax for fraud are primarily remedial: to protect the revenue and to reimburse the government for the expense of investigating fraud (Pet. App. at A8). The court noted that—unlike the forfeiture provision that implicated the Excessive Fines Clause in *United States* v. *Bajakajian*, 524 U.S.

"whether it appears excessive in relation to the alternative purpose assigned."

321 (1998)—the addition to tax for fraud is not imposed as part of a criminal sentence and is imposed without regard to whether the taxpayer has been convicted of a felony (Pet. App. A8). The court concluded that, because the addition to tax for fraud is remedial rather than punitive, it is not barred by the Excessive Fines Clause (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The Fifth Amendment of the Constitution states that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." This Clause protects against "the imposition of multiple *criminal* punishments for the same offense" (*Hudson* v. *United States*, 522 U.S. at 99) and "serves the function of preventing both 'successive punishments and . . . successive prosecutions'" (*United States* v. *Ursery*, 518 U.S. 267, 273 (1996)). The court of appeals correctly held that the imposition of the addition to tax for fraud for petitioner's 1977 and 1978 tax years, after his conviction for criminal tax offenses for those years, did not expose him to unconstitutional double jeopardy.[5]

In *Helvering* v. *Mitchell*, 303 U.S. at 401-406, this Court concluded that the addition to tax for fraud is civil and remedial in nature and does not implicate the

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[5] In Tax Court, petitioner challenged the addition to tax for 1976 as well as those for 1977 and 1978. The addition to tax for 1976, however, raises no double-jeopardy issue because his criminal convictions involved only the years 1977 and 1978. See *United States* v. *Dixon*, 509 U.S. 688, 704 (1993); *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

constitutional prohibition against double jeopardy.[6] The Court explained in *Mitchell* that civil tax sanctions are imposed primarily to protect the revenue and to reimburse the government for the expense of investigating and correcting the taxpayer's return. *Id.* at 401. The Court emphasized that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Id.* at 399. The Court held that additions to tax for fraud were "[o]bviously * * * intended by Congress as civil incidents of the assessment and collection of the income tax." *Id.* at 405.

This Court has repeatedly cited the decision in *Mitchell* with approval. See, *e.g.*, *Hudson* v. *United States*, 522 U.S. at 99, 103, 104; *Ursery*, 518 U.S. at 273, 289, 292; *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 779 n.16 (1994); *United States* v. *Ward*, 448 U.S. 242, 250 (1980); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 236 (1972); *Spies* v. *United States*, 317 U.S. 492, 495 (1943); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943). Every appellate court that has considered the matter (both before and after the decision of this Court in the *Kurth Ranch* case) has followed *Mitchell* in concluding that the civil additions to tax for fraud do not constitute "punishment" within the scope of the Double Jeopardy Clause. See *I & O Publishing Co.* v. *Commissioner*,

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[6] The addition to tax involved in *Mitchell* stated that, "[i]f any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid." Revenue Act of 1928, ch. 852, § 293, 45 Stat. 791.

131 F.3d 1314, 1316 (9th Cir. 1997); *United States* v. *Alt*, 83 F.3d 779, 782 (6th Cir.), cert. denied, 519 U.S. 872 (1996); *Thomas* v. *Commissioner*, 62 F.3d 97, 100-102 (4th Cir. 1995); *McNichols* v. *Commissioner*, 13 F.3d 432, 435-436 (1st Cir. 1993), cert. denied, 512 U.S. 1219 (1994). See also *Bickham Lincoln-Mercury, Inc.* v. *United States*, 168 F.3d 790 (5th Cir. 1999) (civil sanction for failing to file forms reporting receipt of more than $10,000 in cash is not "punishment" within the scope of the Double Jeopardy Clause); *Ames* v. *Commissioner*, 112 T.C. 304 (1999) (same with respect to negligence penalty).[7] There is thus no conflict among the circuits nor other reason to warrant further review of the decision in this case.

b. Petitioner errs in contending (Pet. 12-13) that the decision of the court of appeals conflicts with *Department of Revenue* v. *Kurth Ranch*, *supra*, in which this Court held that a Montana tax on the possession of drugs constituted a criminal punishment within the

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[7] For the reasons described in detail in the decision of the court of appeals (Pet. App. A4-A7), the addition to tax for fraud satisfies the two-part test articulated by this Court in the *Hudson* and *Mendoza-Martinez* decisions. See pages 4-5, *supra*. Although, as petitioner notes (Pet. 10), the conduct to which the civil fraud statute applies would also generally constitute a crime, this Court has expressly held that fact is "insufficient to render the money penalties * * * criminally punitive." *Hudson* v. *United States*, 522 U.S. at 105. Accord, *Helvering* v. *Mitchell*, 303 U.S. at 399. Similarly, while *scienter* is a prerequisite to the imposition of the civil fraud additions, the existence of a *scienter* prerequisite to a civil sanction is not determinative of the double jeopardy issue. See, *e.g.*, *S.A. Healy Co.* v. *Occupational Safety & Health Review Comm'n*, 138 F.3d 686, 688 (7th Cir. 1998); *LaCrosse* v. *Commodity Futures Trading Comm'n*, 137 F.3d 925, 931, 932 (7th Cir. 1998); *SEC* v. *Palmisano*, 135 F.3d 860, 865-866 (2d Cir.), cert. denied, 119 S. Ct. 555 (1998).

constraints of the Double Jeopardy Clause. The state "tax" involved in the *Kurth Ranch* case was quite unusual: (i) it could be imposed only after an arrest for a drug offense; (ii) it was extremely high, amounting to 400 percent of the market value of the illegal drug; and (iii) it had no relation to the costs incurred by the State in investigating and prosecuting drug offenses. 511 U.S. at 784. Moreover, while the state tax in *Kurth Ranch* purported to be a property tax on the possession and storage of marijuana, it was not imposed until after the marijuana had been destroyed. None of these anomalous factors is present here. To the contrary, as other courts have emphasized in upholding the constitutionality of the addition to tax for fraud, "[t]he addition to tax imposed in this case is at the opposite end of the punitive/remedial spectrum from the tax levied in *Kurth Ranch*." *Thomas* v. *Commissioner*, 62 F.3d at 101-102.

c. Petitioner errs in contending (Pet. 6-7, 13) that *Helvering* v. *Mitchell*, *supra*, does not apply to this case. Petitioner asserts that *Mitchell* is inapplicable here because the taxpayer in that case had been acquitted, rather than convicted, of tax crimes before imposition of the addition to tax for fraud. This Court has long held that application of the Double Jeopardy Clause does not depend on the outcome of the first case: it applies whether the first case resulted in a conviction or in an acquittal. *Murphy* v. *United States*, 272 U.S. 630, 632 (1926). Indeed, in *Mitchell* itself the Court specifically held that the same principles apply under the Double Jeopardy Clause "whether the verdict [in the criminal case] *was an acquittal or a conviction*." 303 U.S. at 398 (emphasis added). As the court of appeals correctly stated in this case, "*Mitchell*'s conclusion that Congress intended additions to tax for

fraud to be a civil sanction is not limited to cases in which the taxpayer has previously been acquitted, rather than convicted, of criminal tax fraud" (Pet. App. A4).

Petitioner errs in contending that, in *Helvering* v. *Mitchell*, 303 U.S. at 397-398, this Court left open the question whether the Double Jeopardy Clause is implicated "where a conviction for tax fraud simultaneously determines a taxpayer's tax liability and § 6653(b) addition to tax for fraud for the same tax years" (Pet. 6-7). In *Mitchell*, the taxpayer had been acquitted of tax evasion and contended that his acquittal would, under the doctrine of *res judicata*, bar the Commissioner from seeking to impose the addition to tax for fraud. The Court rejected that contention because "[t]he difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*." 303 U.S. at 397. Having reached that conclusion, the Court stated that it was unnecessary to reach the government's alternative contention that the doctrine of *res judicata* was also inapplicable because of "the difference in the issues presented in the two cases." *Id.* at 398. The Court concluded that it was unnecessary to reach the question of the difference, if any, between "wilfully" (in the criminal statute) and "fraud" (in the civil statute) because the acquittal in the criminal case "is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based * * * ." *Id.* at 397.

2. a. The Eighth Amendment of the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Fines Clause "limits the government's power to extract payments, whether

in cash or in kind, as punishment for some offense." *United States* v. *Bajakajian*, 524 U.S. 321, 328 (1998) (internal quotation marks omitted). The court of appeals correctly held that the additions to tax involved in this case were remedial, rather than punitive, and that the Excessive Fines Clause is therefore not implicated in this case (Pet. App. A7-A9).

Petitioner errs in contending (Pet. 14-22) that this holding of the court of appeals conflicts with *Austin* v. *United States*, 509 U.S. 602 (1993). In *Austin*, the Court held that the determinative question under the Excessive Fines Clause "is not * * * whether [the challenged sanction] * * * is civil or criminal, but rather whether it is punishment." *Id.* at 610. The Court noted that the civil forfeiture statute involved in *Austin* had historically been viewed as punishment (*id.* at 618) and that the presence of a merely incidental remedial purpose in a forfeiture statute does not save such a punitive sanction from scrutiny under the Excessive Fines Clause. *Id.* at 610, 621-622.

The present case obviously differs from *Austin*, in which the Court concluded that the forfeiture sanction at issue in that case was sufficiently punitive to warrant scrutiny under the Eighth Amendment. The Court has long held that the addition to tax for fraud is remedial, rather than punitive, and that it functions as a safeguard for the protection of the revenue and to reimburse the government for the expense of investigating and redetermining the taxpayer's liability. *Helvering* v. *Mitchell*, 303 U.S. at 401. For that reason, the courts of appeals have consistently held, both before and after *Austin*, that civil additions to tax imposed under the Internal Revenue Code do not violate the Excessive Fines Clause. See, *e.g.*, *Little* v. *Commissioner*, 106 F.3d 1445, 1454-1455 (9th Cir. 1997);

United States v. *Alt*, 83 F.3d at 783; *Thomas* v. *Commissioner*, 62 F.3d at 100-102; *McNichols* v. *Commissioner*, 13 F.3d at 434.

b. Petitioner further errs in contending (Pet. 14-22) that the decision in this case conflicts with *United States* v. *Bajakajian*, *supra*. In *Bajakajian*, a traveler seeking to leave the country with $357,144 in cash was arrested for failing to comply with reporting requirements. In the criminal indictment, the government sought not only a conviction for violation of the reporting requirement but also a forfeiture of the entire $357,144. The relevant statute mandated the forfeiture of any property "involved in" the offense (18 U.S.C. 982(a)(1)). The lower courts concluded, however, that a forfeiture of the entire amount would violate the Excessive Fines Clause. 524 U.S. at 326-327.

This Court affirmed. The Court held that the forfeiture qualified as a "fine" within the meaning of the Excessive Fines Clause because it was imposed only as an additional sanction upon a person who has been convicted of a crime and thus represented "punishment for an offense." 524 U.S. at 328. In the present case, by contrast, the addition to tax is *not* "imposed at the culmination of a criminal proceeding" and does *not* "require[] conviction of an underlying felony" (*ibid.*). The addition to tax is assessed and collected as part of civil tax proceedings. It may be imposed without regard to whether the taxpayer has been convicted of a related tax offense. Indeed, as noted by the court below (Pet. App. A8), it may be imposed even when the taxpayer has been *acquitted* of a related criminal offense.

As this Court held in *Mitchell*, the addition to tax for civil fraud is a remedial measure designed to safeguard the revenue. 303 U.S. at 401. Unlike the forfeiture at issue in *Bajakajian*, the addition to tax is not "punish-

ment for an offense" (524 U.S. at 328) and therefore does not constitute a "fine" within the meaning of the Excessive Fines Clause.

Moreover, even if the addition to tax were thought of as a "fine," this civil sanction for the recovery of costs associated with investigating and redetermining the taxpayer's liability is not "excessive." A "fine" violates the Excessive Fines Clause only "if it is grossly disproportional to the gravity of a defendant's offense." *United States* v. *Bajakajian*, 524 U.S. at 334, 336. In *Bajakajian*, where "[t]here was no fraud on the United States, and respondent caused no loss to the public fisc" (*id.* at 339), the Court held that the criminal forfeiture of $337,144 was disproportionate to what was "solely a reporting offense" (*id.* at 337). The additions to tax involved in this case are set by Congress at one-half the amount that petitioner wrongfully withheld. That amount is designed to compensate the government for the significant costs incurred in investigating and redetermining petitioner's liability. The additions to tax resulting from petitioner's fraud are thus plainly not "grossly disproportional" to petitioner's acts. See *United States* v. *Alt*, 83 F.3d at 782-783 (additions to tax "not outrageous" in light of purpose to compensate government for the costs of investigation, detection, and recovery of lost money); *Thomas* v. *Commissioner*, 62 F.3d at 102 (civil fraud penalty not excessive).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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